Preemption and the Obesity Epidemic: State and Local Menu Labeling Laws and the Nutrition Labeling and Education Act

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I. Introduction

Worldwide, obesity has become a major cause of preventable death, disease, and disability.[1] While the epidemic of obesity is a significant public health issue in many developed nations, the United States has the highest prevalence of obesity among adults and children internationally.[2] The National Health and Nutrition Examination Survey (NHANES) estimates that over 60 percent of U.S. adults are overweight or obese.[3] According to the Centers for Disease Control and Prevention, "overweight" refers to adults whose body mass index (BMI), a number calculated using weight and height measurements, is between 25 and 29.9.[4] "Obese" refers to adults whose BMI is 30 or higher. Among American children and adolescents, approximately 17 percent are overweight.[5]

Americans are getting heavier; obesity trends in the United States have increased markedly over the last two decades. A national goal set in 2000 of reducing childhood and adolescent overweight or obesity from 11 percent to 5 percent, and adult obesity from 23 percent to 15 percent, by 2010 is now completely out of reach.[6] A recent survey conducted by researchers at the Johns Hopkins Bloomberg School of Public Health estimated that by 2015, potentially 41 percent of American adults will be obese, and 24 percent of children and adolescents will be overweight or obese.[7]

As a result, reducing obesity among children and adults has become a national health goal in the United States. Achieving this objective, however, is challenging. Public and private sector entities in the U.S. are working to develop and implement new approaches to curb obesity. Underlying these approaches is a host of legal responses at each level of government (federal, state, tribal, and local) that are designed to directly or indirectly address obesity and its contributing factors.[8] These legal responses include efforts to change individual behaviors and norms through the use of incentives to encourage healthy behaviors and disincentives to avoid unhealthy options. Public and private partners are collaborating to create communities that support healthy lifestyles, promote physical education or fitness programs in schools and the workplace, and regulate the types of foods sold in schools and marketed to kids. Consistent with these legal strategies, government is also positioned to regulate the types and amount of information about food products that may help American consumers make healthier choices.

Public health practitioners and others strongly assert the need to communicate nutritional information to consumers about the foods they eat, particularly when they eat out. Americans are increasingly purchasing and eating more meals out, with adults and children consuming about a third of their calories while away from home.[9] These findings are important because of the following: (1) foods purchased outside of the home "are generally higher in calories and saturated

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fat and lower in nutrients, such as calcium and fiber, than home-prepared foods";[10] (2) increased calorie consumption without commensurate calorie expenditure, such as increased exercise, is directly tied to weight gain;[11] and (3) few restaurants nationally provide customers with point-of-sale information about the ingredients or calories in the foods they consume despite evidence that adults want this type of information.[12] As a result, when Americans dine out they typically lack any nutritional data to help them make healthier choices.

The U.S. Surgeon General, Food and Drug Administration (FDA), and Institute of Medicine have all called for "increase[d] availability of nutrition information for foods eaten and prepared away from home."[13] In response, some states and localities across the United States have introduced menu labeling bills and regulations that require restaurants (usually chains) to post information, such as calorie content, for foods offered on their menus or menu boards. These bills and regulations seek to provide similar nutritional information for food served in restaurants as the federal Nutrition Labeling and Education Act (NLEA) already requires for most packaged foods. A major legal dilemma concerning state or local menu labeling laws, however, is whether these laws are effectively preempted by the NLEA, which does not require calorie or other nutritional information to be posted for foods served in restaurants.

Any legislative or regulatory intervention at the federal, state, or local level — including menu labeling laws — raises the issue of preemption. Preemption refers to the ability of a higher level of government to disallow or prevent certain actions at a lower level. The Supremacy Clause of the U.S. Constitution declares federal law to be the supreme law of the land, allowing acts of Congress or federal agencies to preempt state or local law.[14] At the state level, local laws can be also be preempted by acts of the state legislature or state regulatory agencies.

Preemption can have an important effect on public health law and policy. Sometimes preemption can help to promote public health objectives by ensuring uniform application of the law. For example, most public health advocates would naturally prefer a strong federal law that supports a public health intervention instead of a patchwork of weaker or inconsistent state or local laws.

Often, however, preemption of state or local laws interferes with public health goals. Many public health problems are not distributed evenly throughout the population. Urban areas may face different challenges than more rural ones; newer communities have unique problems compared with older areas; and more racially or ethnically diverse jurisdictions often must confront different challenges than more homogeneous places. As a result, a state or locality may wish to enact a law or regulation intended to respond to its specific public health situation.[15] But preemption may make it difficult or impossible to enact a state or local law that is more restrictive than, or inconsistent with, federal law. This is especially problematic where existing federal law is relatively weak. For example, the state of Massachusetts promulgated regulations in 1999 to deter smoking by children. Those regulations forbid, in part, certain kinds of tobacco advertising near places frequented by young people (e.g., schools and playgrounds). Despite the acknowledged importance of deterring youth smoking, the U.S. Supreme Court ruled that Massachusetts's regulations, as applied to cigarettes, were preempted by the weak federal laws that govern cigarette advertising.[16]

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In addition to affecting state and local legislative or regulatory efforts, preemption can also impact lawsuits intended to protect the public's health.[17] Litigation against the makers of dangerous products has led to their removal or redesign to reduce risks.[18] However, courts have ruled that even state lawsuits can be preempted by federal law. For example, in one recent decision the Supreme Court determined that lawsuits against the makers of medical devices that had undergone a relatively rigorous pre-market approval process under federal law were preempted.[19] Similarly, some early lawsuits against car makers who failed to provide air bags in their vehicles were deemed preempted by federal motor vehicle safety standards.[20] This determination depends on the specific language of the applicable federal law; for example, lawsuits against the makers of a different class of medical devices[21] and against marine engine manufacturers[22] have been allowed to proceed despite claims of preemption.

As the Supreme Court continues to decide new preemption cases, including several in 2008-2009, the precise parameters of preemption — and its effect on public health — will continue to evolve. Many industries are currently urging courts, legislatures, and regulatory agencies to expand the preemptive power of federal laws. Obesity prevention advocates need to understand and appreciate the role and scope of preemption in their work. Menu labeling laws provide a useful lens through which to examine these issues, particularly in light of ongoing litigation in New York City over alleged NLEA preemption of the City's menu labeling regulation.

In this article, we examine the role that preemption plays in state and local efforts to enact menu labeling laws. In Part II, we provide an overview of menu labeling laws as a response to the obesity epidemic as well as a summary of recent federal, state, and local approaches to menu labeling. Fundamental legal principles that underlie preemption are discussed in Part III. We then explain in Part IV how the NLEA raises preemption issues for state and local menu labeling laws. We conclude in Part V by determining that appropriately written and implemented menu labeling laws should not be preempted by the NLEA. In addition, we offer guidance for states and localities that wish to develop and implement menu labeling laws.

II. Menu Labeling Laws and the Obesity Epidemic

One approach to combating the obesity epidemic is to provide restaurant consumers with information about the nutritional content of menu items.[23] Many public health advocates believe that this type of information may help people to make more informed choices about the foods they choose to purchase and eat.[24] Restaurants use a variety of approaches to provide nutritional information to consumers. For example, some choose to make nutritional information available on the restaurant's Web site,[25] on tray liners, or in brochures.[26] These approaches provide some customers with information, but they may not be convenient, relevant, or appropriate. For example, when nutritional information is provided on a Web site, a potential customer must have a computer, access to the internet, and the foresight to research this information before going to the restaurant. While tray liners are provided with a person's purchase, any information that they contain is generally not available until after the consumer has already ordered his or her meal.[27] Brochures may be available only upon request, out of stock, or difficult for some consumers to assess.[28] None of these options guarantees that a customer will have access to timely, simple nutritional information before purchasing his or her food. Providing this information after the purchase has been made might educate a consumer as to future purchases, but it likely will not change the food choices that he or she just made.

Alternatively, restaurants can provide nutritional information, such as calorie or fat content, on their menus or menu boards. This practice, known as "menu labeling," seeks to provide simple, factual information directly to consumers at their point-of-purchase. Menu boards can take several forms, such as the large back-lit signs that appear above the cashiers in many fast food restaurants. In some restaurants,

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particularly fast food outlets, these signs are used in lieu of printed menus to inform customers of the restaurant's offerings. Menu boards usually contain pricing information as well as photographs of certain food items. They can also appear outside of restaurants that offer drive-thru service. In these instances, the exterior menu board provides a summary of the restaurant's offerings and pricing information. When nutritional information is provided as part of a menu or menu board, customers can easily learn about an item's nutritional content *before* deciding what to purchase. Menu labeling via menu boards has already been adopted by some chain restaurants, including Subway and Starbucks in New York City.[29]

(D-CT).[37] The bills propose amending the Federal Food, Drug, and Cosmetic Act to require chain restaurants (i.e., restaurants with 20 or more locations doing business under the same name) to provide information about "calories, grams of saturated fat plus trans fat, and milligrams of sodium" on their menus in "a clear and conspicuous manner."[38] Chain restaurants would also be required to list calorie content of foods on their menu boards.[39] The bills address preemption concerns by stating, "Nothing in this clause precludes a State or political subdivision of a State from requiring that a restaurant or similar food establishment provide nutrition information in addition to that required under this clause."[40] If passed, this federal legislation would serve as a regulatory floor, allowing states and localities to require that chain restaurants provide additional nutritional information beyond what the federal law would require.

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A. Federal Approaches to Menu Labeling

The federal government does not currently require restaurants to engage in menu labeling. The NLEA,[30] which went into effect in 1994, requires manufacturers to provide nutritional information on most packaged foods.[31] However, the law explicitly exempts restaurants from having to provide nutritional information to their customers,[32] unless the restaurant makes a nutritional claim about its food. In these cases, the restaurant must, to a limited extent, make nutritional information available to its customers about the food in question.[33] For example, if a restaurant's menu claims that an item is low in fat, the restaurant must have information available about the fat content of that item.[34] Restaurants face no other national requirement for providing nutritional information to their customers. As a result, approximately half of the largest chain restaurants provide no nutritional information to customers.[35]

Federal legislators have recently raised the issue of menu labeling with the introduction of several bills in the 110th Congress. In March 2008, Tom Harkin (D-IA) introduced the Menu and Education Labeling (MEAL) Act in the United States Senate.[36] A nearly identical bill was introduced in the House of Representatives in October 2007 by Rosa DeLauro

In May 2007, Tom Harkin (D-IA) introduced the Healthy Lifestyles and Prevention (HeLP) America Act in the United States Senate[41] and Tom Udall (D-NM) introduced a similar bill in the House of Representatives.[42] The bills feature numerous provisions that are broadly intended to improve Americans' health, including sections devoted to menu labeling in restaurants. These bills include revisions to the Federal Food, Drug, and Cosmetic Act that are identical to the revisions proposed by the MEAL Act, including its preemption language. However, neither the HeLP America Act nor the MEAL Act has received substantial attention in the Senate or the House to date. Similar bills were introduced during the 108th and 109th Congresses, also with little success.[43]

B. State and Local Approaches to Menu Labeling

In the absence of federal legislation in this area, many states and localities have introduced bills and regulations that would require certain types of restaurants to engage in menu labeling.[44] During the 2007-2008 legislative session, at least 21 states and localities introduced menu labeling legislation. Three major metropolitan areas have already passed laws or regulations

in this area.[45] The first locality, New York City, enacted menu labeling regulations in 2007 and 2008 that have been the subject of recent litigation.[46] This litigation and its ramifications are discussed in detail in Part V. In March 2008, San Francisco enacted a menu labeling regulation.[47] Finally, King County, Washington, which includes Seattle, has adopted a regulation that will go into effect on December 1, 2008. This regulation requires chain food establishments with 15 or more locations to display calorie, carbohydrate, saturated fat, and sodium information on menus. Menu boards must display calories in sizes and typefaces "that [are] easily readable"[48] and information about carbohydrates, saturated fat, and sodium must be available at the point of ordering.[49] The regulation applies only to items that remain on the restaurants' menus for more than 90 days.

King County's regulation reflects elements that appear repeatedly in state and local proposed menu labeling bills and regulations. Nearly all of the bills and regulations limit their application to chain restaurants, a status that is determined either by specifying the number of restaurant locations (e.g., 10 or more)[50] or the amount of yearly revenue that the restaurant makes (e.g., $10 million or greater).[51] In addition, virtually all of the bills and regulations specify the nutritional information that must be included on menus and menu boards in the affected restaurants. Most frequently, the required information for menus includes calories, fats, carbohydrates, and sodium content per serving for each item.[52] Many bills and regulations treat menu boards separately, requiring them only to display calorie information, but also mandating that the restaurant have additional nutritional information available upon request or visible elsewhere in the restaurant.[53] Like the King County regulation, many proposed bills and regulations also specify how prominently the nutritional information must be displayed (e.g., font size).[54]

Some of the proposed bills and regulations specify which menu items will be impacted by labeling. For example, a proposed menu labeling bill in Montgomery County, Maryland, would apply to "standard menu items . . . on the menu for 30 days or more."[55] In addition, some bills and regulations contain language that would exempt restaurants that provide an approved alternative arrangement for conveying nutritional information to customers.[56] Finally, the bills and regulations generally specify an enforcement mechanism for lack of compliance, such as a $500 fine.[57]

III. Preemption

In the United States governmental system, federalism divides power between a central authority, the federal government, and the states. In addition, the principle of separation of powers requires each branch of government — legislative, executive, and judicial — to respect defined roles and responsibilities. The legal doctrine of preemption echoes these constitutional principles with its respect for the domains of authority among the levels and branches of government.

Federal preemption refers to the ability of the federal government to deprive state and local governments of their ability to legislate or regulate in a particular area. The federal government's authority to preempt state and local laws derives from the Supremacy Clause in Article VI of the U.S. Constitution, which declares that federal law is "the supreme Law of the Land."[58] Thus, as long as the federal government is acting within its enumerated powers and does not violate any provision of the Constitution, federal laws may preempt state and local laws. State governments also have the power to preempt local laws and regulations, as discussed later in this section.

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When one party to a lawsuit alleges that a state or local law is subject to preemption by a federal law, it is the job of the courts to resolve the dispute. If a party challenges the authority of Congress to enact the allegedly preemptive federal law in the first place, however, this may represent a threshold constitutional question for the court. Next the court will proceed with its preemption analysis. To begin this analysis, a court will usually first examine the text of the federal statute or regulation in question. In addition, a court will often consider the statute's or regulation's history, to determine Congress's intent regarding preemption. Courts are especially sensitive to the intricacies of preemption analyses because there has traditionally been a presumption against federal preemption. In recognition of the structural constitutional principle of federalism,[59] courts "[have] long

presumed that Congress does not cavalierly pre-empt state law."[60]

This presumption becomes increasingly important when courts consider a federal preemption claim that relates to an area in which states have traditionally legislated. The 10th Amendment of the U.S. Constitution and Supreme Court jurisprudence recognize that states' police powers allow them "to enact laws and promulgate regulations to protect, preserve, and promote the health, safety, morals, and general welfare of the people."[61] The federal government does not have police powers,[62] but instead must craft its health-related legislation pursuant to its enumerated powers to regulate commerce or to tax and spend. Therefore, when a preemption claim arises from federal interventions that delve into the domain of traditional state police powers, courts "start with the assumption that the historic police powers of the States were not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress."[63]

Stakeholders at the federal and state or local levels often have conflicting views about preemption. Federal lawmakers may favor preemption because they want to establish uniformity across all 50 states for a particular issue. This has occurred in areas like the safe design of bicycle helmets, in which the federal government established strict safety standards that all states are required follow.[64] State and local actors may agree with federal preemption when a federal legislative or regulatory approach is particularly helpful to resolve existing issues nationally, as well as within their state or locality. Conversely, state and local officials, as well as advocacy groups, may seek to avoid preemption when it denies them the opportunity to tailor local laws to meet local problems.[65] State legislators may feel that they, rather than the federal government, have a better sense of their constituents' needs. For this reason, the federal government will sometimes explicitly avoid preempting state laws despite its ability to do so.

A. Types of Federal Preemption

Preemption analyses turn on whether a conflict exists between laws at different levels of government.[66] Federal preemption typically focuses on whether a state or local law somehow conflicts or interferes with federal law. Even if there is no direct conflict, state or local law may be ineffectual because federal law encompasses an entire legal area. Political forces may work to address and resolve preemption issues. For example, Congress may amend legislation that is viewed to have unintended preemptive effects. Federal agencies may clarify the preemptive status of their regulations through rule-making processes. State and local governments may simply work around preemptive federal laws. Any remaining preemption challenges may require judicial resolution, which is guided by decisions of the United States Supreme Court, the ultimate arbiter of preemption disputes. Lower courts must turn to the Supreme Court's preemption jurisprudence for guidance in their treatment of preemption cases. Unfortunately, the Supreme Court's treatment of federal preemption cases has been "neither clear nor consistent,"[67] due in part to the complex nature of issues that demand case-specific inquiries of statutes to understand Congressional intent. Nevertheless, several themes run through the Supreme Court's treatment of preemption cases, which help establish a framework for understanding the ways in which laws can be preempted.

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1. EXPRESS PREEMPTION

When drafting federal legislation, Congress can choose to include statutory language that expressly restricts the ability of states and localities to legislate in a particular area. As a result, certain federal laws contain language expressly preempting state or local laws.[68] In the most extreme cases, a federal law can "remove[] any discretion of the states to act in a given area of regulation, replacing it with federal decisions and a federal mechanism for regulation."[69] This

type of complete preemption occurs in very limited contexts, such as the issuance of patents or matters of foreign policy, where the "Constitution has given a particular function exclusively to federal control."[70] Most express preemption clauses are not this extreme. For example, some federal statutes will explicitly forbid state or local laws that are "'inconsistent' with the federal statutory policy or its various program provisions."[71] In this scenario, the states can still legislate in a particular area, but the states' laws must remain consistent with the federal legislation.

When Congress incorporates express preemption language in a statute, its intent to preempt state and local laws is clear. A court, however, must still determine if Congress has the power to enact the statute and assess the extent of Congress's intent to preempt.[72] If, for example, a federal statute expressly preempts state and local laws that are inconsistent with the federal statute, a court will have to examine the federal law to determine (1) what constitutes an inconsistency, and (2) whether the state or local law in question is actually inconsistent.

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Some federal statutes include language that indicates Congress's intent not to preempt certain aspects of state and local law. This anti-preemption language, also known as a savings clause, suggests Congress's specific intent to permit some kinds of state law or local law. A savings clause might say, "Nothing in this Act shall . . . be construed as impairing or in any way affecting any right or jurisdiction of the States with respect to [the issue.]"[73] The presence of a savings clause can allow states to develop stricter standards than those imposed by the federal government.

2. IMPLIED PREEMPTION

Even when Congress does not expressly preempt state or local law, courts may still conclude that such laws are impliedly preempted by federal law. In these instances, a court must determine if Congress has the power to enact the statute and, if so, the court must then infer whether the federal statute preempts state and local law. Implied preemption claims are classified as either "field preemption" or "conflict preemption."

a. Field Preemption

In field preemption cases, a court must determine whether Congress expressed an intent to occupy a particular field or subject area to the exclusion of state or local laws.[74] If so, then any state or local law in that field would inherently conflict with federal laws and regulations. When making a field preemption inquiry, a court will consider the federal statute as well as the body of federal laws and regulations in a particular area, to gauge Congress's intent to wholly occupy the field. As the Supreme Court has explained, in some cases "the scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."[75] In such cases, a court will find that the federal law preempts the state or local law in question. For example, the Supreme Court recently determined that Congress set federal standards for certain classes of medical devices to the exclusion of any state or local laws in this area.[76]

While field preemption inquiries are clearly case specific, Erwin Chemerinsky identifies additional criteria, based on case law, that are crucial to a field preemption analysis: (1) is the area in question one in which the federal government traditionally has played a unique role? (2) has Congress expressed an intent in the text of the law or in the legislative history that federal law should be exclusive in the area? (3) would allowing state and local regulations in the area actually or potentially interfere with comprehensive federal regulatory efforts? and (4) is there an important traditional state or local interest served by the law?[77]

b. Conflict Preemption

The other category of implied preemption is called conflict preemption. Conflict preemption can arise in two contexts. First, a state or local law will be preempted if a court finds that "federal law and state law are mutually exclusive, so that a person could not simultaneously comply with both."[78] In this situation, a court must first ask what is prescribed by the federal law and the state or local law. Next, the court must determine what portions of the state or local law con-

flict with the federal law.[79] Those sections of the state or local law that make it impossible to comply with the federal law are preempted.

The second type of conflict preemption occurs when a court finds that a state or local law impedes a goal associated with a federal law. In this situation, the state or local law does not directly conflict with federal law. Instead, the state or local law conflicts with the federal objective. This type of analysis is particularly difficult because a court must characterize the federal objective and also determine if the state or local law obstructs it.[80] These cases, known as obstacle preemption cases, are often among the most challenging to resolve.[81] While a court will look to the text and legislative history of a federal law, a determination of preemption in this context is extremely case specific: "If a court wants to avoid preemption, it can narrowly construe the federal objective and interpret the state goal as different from or consistent with the federal purpose. But if a court wants to find preemption, it can broadly view the federal purpose and preempt a vast array of state laws."[82] For example, in *Geier v. American Honda Motor Co.*, the Supreme Court concluded that a state lawsuit alleging that a car should have been equipped with airbags was preempted because it conflicted with a federal law that, at the time, sought to phase in, rather than require, the installation of airbags.[83]

B. Additional Preemption Issues for Localities

At the local level, ordinances or other laws may be subject to preemption by both the federal and state governments.[84] While federal preemption is a consequence of federalism, state preemption of local ordinances arises under a different construct. Unlike federal and state governments, which enjoy sovereign status, localities are not sovereign entities. Rather, a locality enjoys power because the state government, through the state's constitution or a piece of state-level legislation, grants authority to the locality. Accordingly, localities derive their existence from the state, must adhere to state laws, and have limited ability to regulate independently from the state.

Because each state has a unique relationship with its localities, preemption of local ordinances by state laws and regulations is subject to state-by-state variation. Some broad principles apply, however, to the preemption of local laws by state laws and regulations. Preemption analyses of local laws via state government depend on the breadth of authority provided to localities via these rules. Most localities were originally granted power by states through Dillon's rule,[85] which holds that "all local powers [can] be traced back to a specific delegation [of power by the state.]"[86] Under Dillon's rule, local governments have only those powers that are expressly granted by the state. Dillon's rule provides that if there is reasonable doubt that the state has conferred a certain power upon a locality, the issue will be resolved against the locality. Courts will presume the locality does not have the power in question.[87]

As the restaurant industry and other interest groups encourage states to preempt local menu labeling laws and regulations, advocates should understand whether their state grants localities broad home rule powers, as this may impact a locality's ability to avoid preemption of its menu labeling laws or regulations.

During the last century, many states have abandoned Dillon's rule and amended their constitutions to grant local governments the ability to act more autonomously on matters of purely local concern through what is known as "home rule."[88] Home rule, which allows localities to take legislative or other action for issues of local concern without relying upon a specific grant of authority from the state, effectively grants local governments the ability to control purely local matters.[89]

Since home rule gives localities considerable discretion in creating local policy, it may serve as a barrier to state preemption of local ordinances,[90] subject to the terms of a state's grant of home rule. Typically a state will specify that ordinances enacted by localities cannot conflict with the state's own laws.[91] On the other hand, the state may use more expansive language in its grant of home rule, which would give the locality greater protection from having its ordinances preempted by state law. For example, the Illinois constitution provides a broad grant of home rule: "[Localities] may exercise any power and perform any function pertaining to [their] government and affairs including, but not limited to, the power to regulate for

the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt."[92]

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C. State Efforts to Preempt Local Menu Labeling Efforts

Some states have introduced bills and regulations that would restrict the ability of localities within the state to enact and implement menu labeling laws and regulations. For example, in 2008 the Washington State Legislature considered a bill, supported by the Washington Restaurant Association,[93] that would preempt local menu labeling ordinances.[94] This is significant because the current version of the Washington menu labeling bill would effectively preempt the menu labeling ordinance that was adopted in 2008 by King County, a locality in Washington. In light of this, representatives from King County and from the Washington Restaurant Association negotiated an agreement in which King County amended portions of its ordinance and the Washington Restaurant Association agreed to drop its support of the state-level bill. In addition, as part of this agreement, the Washington Restaurant Association agreed that it would not join any lawsuit against King County related to its menu labeling ordinance.[95]

Several other state legislatures have passed bills that would preempt localities' ability to implement menu labeling laws and regulations. Earlier this year, Ohio's governor signed an industry-supported[96] bill into law that preempts any local efforts to enact laws or regulations related to menu labeling in restaurants.[97] Furthermore, in March 2008 the Georgia General Assembly passed a bill that would preempt localities from taking any action regarding menu labeling in restaurants.[98] This bill, which also has restaurant industry support,[99] will become law if it is signed by Georgia's governor.

IV. The NLEA, Menu Labeling, and Preemption

In November 1990, President George H. W. Bush signed the NLEA into law.[100] Congress developed and passed the NLEA "to clarify and to strengthen the [FDA's] legal authority to require nutrition labeling on foods, and to establish the circumstances under which claims may be made about nutrients in foods."[101] The NLEA and its accompanying regulations, promulgated by the FDA, dramatically changed how consumers receive information about the foods that they purchase and consume.[102]

States and localities are preempted by the NLEA from enacting laws that regulate restaurants' voluntary claims about the nutritional content of the food they serve. This does not mean that sub-national governments cannot regulate restaurants regarding claims about their food; they can pass laws regulating restaurants' nutritional claims about food as long as those laws are identical to the requirements of the NLEA. States and localities may choose to do this because it would give them the power to enforce the NLEA at the state or local level.

The NLEA added two significant sections to the Federal Food, Drug, and Cosmetic Act, with the first section addressing nutritional labeling requirements.[103] This section established the standards for the nutrition facts panel found on most packaged foods. Specifically, the NLEA requires the nutrition facts panel to indicate serving size and servings per container as well as to provide information about particular nutrients, vitamins, minerals, and calories per serving.[104] The NLEA makes clear that the mandatory nutritional labeling requirements in this section do not apply to food served in restaurants.[105] States and localities can establish "requirement[s] for nutrition labeling of food . . . which is served in restaurants."[106]

The NLEA's second section applies when restaurants or other entities covered by the law, including manufacturers,[107] voluntarily make a "claim" about a food's nutritional content.[108] Claims about food are regulated differently than nutritional facts. Claims, which may offer nutritional information about the food, tend to characterize the food. Instead of simply listing the food's nutritional content as a label would,

these phrases make a claim or assertion about the food's nutritional content. For example, while a nutritional label would simply list a food's sodium content (e.g., sodium, 280 mg per serving), a "claim" would tell the consumer that the food is "low in sodium." Other examples of claims include phrases like "low in fat" or "high in oat bran."[109]

Whenever claims are made, the NLEA requires restaurants to comply with FDA regulations.[110] These regulations explain what terms can be used to make claims about food (e.g., "healthy," "high in," "low in") and also what scientific standards must be met to support any claims that are made. Therefore, while a restaurant is not required to make claims about the nutritional content of its food (e.g., "healthy, contains 3 grams of fat"), if it voluntarily chooses to do so, on a poster, menu, menu board, tray liner or elsewhere in the restaurant,[111] then it must comply with the FDA's regulations.[112] In addition, if a restaurant chooses to make a claim about the nutritional content of its food, then the restaurant must provide a customer, upon request, with information that substantiates the claim.[113]

A. NLEA Preemption Issues Concerning State and Local Menu Labeling Laws

The NLEA's preemptive effects are explicitly written in the statute: "[The Act] shall not be construed to preempt any provision of State law, unless such provision is expressly preempted [by the NLEA]."[114] This limits the NLEA's preemptive effects to those that are expressly stated in the statute and eliminates the opportunity for state or local laws to be impliedly preempted.

The NLEA contains two express preemption provisions. The first, which concerns nutritional labeling requirements, states that no state or locality "may directly or indirectly establish under any authority . . . any requirement for nutrition labeling of food that is not identical to [those specified by the NLEA]."[115] This preemption provision does not apply, as explained in the NLEA, to nutritional labeling laws that states and localities establish for restaurants, since restaurants are exempt from the NLEA's nutritional labeling requirements.[116] In fact, shortly before the NLEA was passed by the Senate, Senator Howard Metzenbaum (D-OH) addressed this aspect of preemption under the NLEA: "Because food sold in restaurants is exempt from the nutrition labeling requirements [of the NLEA], the [NLEA] does not preempt any State nutrition labeling requirements for restaurants."[117]

The NLEA's second express preemption provision concerns the treatment of state and local laws that regulate restaurants' voluntary "claims" about a food's nutritional content. According to this section, no state or locality "may directly or indirectly establish under any authority . . . any requirement respecting any claim . . . made in the label or labeling of food that is not identical to the requirement of [the NLEA]."[118] Pursuant to this provision, states and localities are preempted by the NLEA from enacting laws that regulate restaurants' voluntary claims about the nutritional content of the food they serve. This does not mean that subnational governments cannot regulate restaurants regarding claims about their food; they can pass laws regulating restaurants' nutritional claims about food as long as those laws are identical to the requirements of the NLEA. States and localities may choose to do this because it would give them the power to enforce the NLEA at the state or local level.[119]

Even if a specific state or local menu labeling law were preempted by the NLEA, the law may still be implemented, if the FDA permits. The NLEA allows states and localities to petition the FDA and ask for permission to avoid preemption of a law that would otherwise be subject to NLEA preemption.

There is one exception to this second preemption provision. According to the NLEA, states and localities can, in certain limited circumstances, enact laws that regulate restaurants' ability to make claims about a food's level of cholesterol, saturated fat, and dietary fiber as well as about nutrients that the FDA may find to be "associated with [an] increased disease or health-related condition risk."[120]

B. The NLEA Allows States and Localities to Petition the FDA

Even if a specific state or local menu labeling law were preempted by the NLEA, the law may still be implemented, if the FDA permits. The NLEA allows states and localities to petition the FDA and ask for permission to avoid preemption of a law that would otherwise be subject to NLEA preemption.[121] To qualify, the state or locality must demonstrate that its law or

regulation (1) will not violate any other federal law; (2) will not burden interstate commerce; and (3) will address a particular need for information that is not met by the NLEA's requirements.[122] The FDA has promulgated regulations that detail the information that states or localities must include in their petition.[123] For many states and localities that would like to request an exemption from NLEA preemption, responding to the law's petition requirements could be a straightforward process: (1) state and local menu labeling laws will likely not violate any other federal laws; (2) while issues involving a burden on interstate commerce can be complex, state and local menu labeling laws are unlikely to raise concerns in this area because they likely do not substantially interfere with interstate commerce;[124] and (3) states and localities can argue that the NLEA does not require menu labeling for restaurants,[125] and advocates believe that this type of information will be beneficial to consumers seeking to make healthy choices.[126]

V. Litigation Involving the NLEA and Preemption of State and Local Menu Labeling Laws

To date, only one series of cases has directly addressed the extent to which the NLEA preempts state or local menu labeling initiatives. In *New York State Restaurant Association v. New York City Board of Health I* (*NYSRA I*),[127] a federal district court determined in September 2007 that, while New York City "has the power to mandate nutritional labeling by restaurants,"[128] the city's regulatory attempt to require menu labeling for restaurants that volunteer calorie information about their food was preempted by the NLEA. In response to this decision, New York City redrafted its menu labeling regulation to instead apply to all chain restaurants. In April 2008, in *New York State Restaurant Association v. New York City Board of Health II* (*NYSRA II*),[129] a federal district court found that New York City's revised regulation was not preempted by the NLEA. Because these cases are the first to directly address this issue, it is important to understand the reasoning behind both decisions, as this will likely influence other courts' interpretations of the NLEA.

A. New York State Restaurant Association v. New York City Board of Health I

In December 2006, the New York City Department of Health and Mental Hygiene adopted Regulation 81.50, which applied only to restaurants that had already voluntarily made public the calorie content of their food. These restaurants generally made this information available to the public in places other than their menus (e.g., the internet, tray liners, pamphlets). The regulation required these restaurants to "post on menu boards and menus the calorie content values . . . for each menu item next to the listing of each such item . . . in a size and typeface at least as large as the name of the menu item or price, whichever is larger."[130] Restaurants were permitted to communicate the required information using alternative displays, pending the Department's approval. Among its reasons for developing the regulation, the Department explained that "calories are the single most important piece of nutritional information related to weight gain . . . . Americans receive an estimated one-third of their caloric intake away from home."[131] New York City's regulation was challenged by the New York State Restaurant Association (NYSRA) on grounds of First Amendment violations and preemption.

Before beginning its analysis, the federal district court recognized that the NLEA does not allow for implied preemption of state or local law, leaving only express preemption as a possibility. Given the NLEA's treatment of restaurants and preemption, the court first had to determine whether Regulation 81.50 con-

In our view, and as made clear by *NYSRA I* and *II*, the NLEA should not be read to preempt all state and local attempts to require restaurants to provide calorie or other information on menus or menu boards. While state and local laws regarding "claims" made by restaurants about a food's nutritional content are subject to NLEA preemption, the Act does not preempt state and local laws regarding nutritional labeling requirements for restaurants. Taken together, *NYSRA I* and *II* provide the beginning of a framework for interpreting the NLEA.

cerned labeling for factual statements about the nutritional content of food (e.g., sodium, 280 mg per serving), or "claims" about the nutritional content of food (e.g., high in oat bran). As discussed above, the NLEA allows states and localities to implement mandatory nutritional labeling laws for food served in restaurants but does not permit regulation of claims made by restaurants about the nutritional content of their food (other than those that are identical to the NLEA itself).

To determine whether Regulation 81.50 was an attempt to regulate labeling or claims, the court considered the FDA's regulations, which were promulgated to aid in the interpretation and implementation of the NLEA. According to these regulations, a "simple numerical statement" about nutritional content may be a claim about a food, rather than a label providing factual information.[132] For example, the FDA's regulations state that the phrase "contains 2 grams of fiber" characterizes, or makes a claim about, the food in question.[133] As the court explained, "In the context of a *voluntary* statement made to its customers, the food purveyor is making an affirmative assertion as to the nutrient content of its product."[134] Therefore, some statements by restaurants about nutritional content, such as the disclosures mandated by Regulation 81.50 for certain restaurants, could be classified as "claims" under the NLEA.

The NLEA preempts localities like New York City from regulating "nutrient content claims, including claims made by restaurants,"[135] when such regulations are not identical to NLEA requirements. The FDA's regulations specify a variety of forms, including posters, brochures, and leaflets, that restaurants can use to publish nutritional information to substantiate a claim made about a food's content. In contrast, Regulation 81.50 specifies that restaurants already making nutritional information available must post calorie content on their menus or menu boards. As a result, the court found that the requirements of Regulation 81.50 are not identical to the NLEA and are, therefore, preempted.

The court explained that its finding of preemption was predicated on the fact that Regulation 81.50 only applied to restaurants that were *already* making voluntary disclosures about nutritional information. The voluntary aspect of Regulation 81.50 caused it to fall into the realm of regulating "claims" rather than "required disclosures." The court suggested that when restaurants voluntarily offer nutritional information about their food, they are making "claims" about their food. By singling out restaurants that were already voluntarily making their food's nutritional information public, Regulation 81.50 was regulating "claims." Given this reasoning, the court noted that other types of regulations that "simply require restaurants to provide nutrition information . . . are not preempted."[136]

If all state and local nutritional labeling laws involve "claims" and are subject to NLEA preemption, then there would be no purpose in Congress allowing states and localities to establish "requirement[s] for nutrition labeling of food . . . which is served in restaurants" without the threat of federal preemption via the NLEA. As *NYSRA II* made clear, courts should not interpret the NLEA in a way that renders one of its provisions obsolete.

The court explained that "New York City [remains] free to enact mandatory disclosure requirements [for the nutritional content of restaurant food]"[137] as long as the regulation does not have a voluntary component.

B. New York State Restaurant Association v. New York City Board of Health II

Rather than appeal the *NYSRA I* decision, the New York City Department of Health and Mental Hygiene revised Regulation 81.50 to require *all* New York City restaurants with 15 or more locations nationally to display calorie content on menus and menu boards.[138] This regulation was re-written to comply with the court's reasoning in *NYSRA I*, but the NYSRA challenged the revised regulation on preemption and First Amendment grounds.[139]

Specifically, in *NYSRA II*, the NYSRA argued that, in direct contrast to the *NYSRA I* ruling, even laws and regulations that require *all* restaurants of a certain class to disclose nutritional content information are subject to NLEA preemption. According to the NYSRA, any disclosure of calorie information can be classified as "a nutrient content claim,"[140] rather than the provision of factual nutritional information.

Therefore, any law or regulation, including revised Regulation 81.50, that requires the disclosure of calorie information by restaurants — whether mandatory or voluntary — involves a "claim," and is subject to preemption by the NLEA.[141]

In *NYSRA II*, the federal district court began its analysis by revisiting the NLEA's treatment of restaurants and nutritional labeling of food. The court reiterated that the NLEA preempts state and local attempts to regulate "claims" that restaurants make about their foods. On the other hand, as the court explained, the NLEA permits states and localities to require restaurants to disclose factual nutritional information about their food.

After clarifying this distinction, the court explained that revised Regulation 81.50 is *not* preempted, because it "is not triggered by a restaurant's prior voluntary disclosure of nutritional information."[142] Revised Regulation 81.50 requires all restaurants of a certain class to make public nutritional information about their food, regardless of whether the restaurants have already voluntarily done this. According to the court, revised Regulation 81.50 is not preempted by the NLEA because this type of "mandatory disclosure is not a claim."[143]

The court found that the NYSRA's argument "ignore[d] the mandatory/voluntary architecture of [the NLEA] . . . as well as the obvious intent of Congress in drafting [the NLEA], which explicitly preserves state authority to impose nutrition labeling requirements on restaurants."[144] The court additionally rejected the NYSRA's reasoning because the NYSRA had suggested that neither the federal government nor states and localities had the ability to require restaurants to disclose nutritional information. By arguing for this "regulatory vacuum," the NYSRA had, according to the court, failed to offer a sound interpretation of the NLEA. Instead, the court chose to uphold the reasoning behind *NYSRA I*, and concluded that, because New York City's revised regulation was "wholly mandatory" in its nutritional labeling requirements, the regulation was not preempted by the NLEA.[145]

The NYRSA has already appealed this verdict, and a federal appellate court is likely to hear the appeal and issue a decision in the coming months.

C. Recent Litigation Provides Important Insights about the NLEA, Menu Labeling, and Preemption

In our view, and as made clear by *NYSRA I* and *II*, the NLEA should not be read to preempt all state and local attempts to require restaurants to provide calorie or other information on menus or menu boards. While state and local laws regarding "claims" made by restaurants about a food's nutritional content are subject to NLEA preemption,[146] the Act does not preempt state and local laws regarding nutritional labeling requirements for restaurants.[147] Taken together, *NYSRA I* and *II* provide the beginning of a framework for interpreting the NLEA.

State and local menu labeling laws provide a potentially important legal tool to address the obesity epidemic in the United States. As with many other efforts to require an industry to alter its conduct in ways that might benefit the public's health, these laws have been subject to a number of legal challenges, including preemption. But if properly written and implemented, state and local menu labeling laws should not be preempted by the federal Nutrition Labeling and Education Act.

Courts can pursue two paths to find that the NLEA does not preempt state and local attempts to impose nutritional labeling requirements on restaurants. First, as the *NYSRA I* and *II* courts reasoned, the NLEA distinguishes state and local efforts that regulate restaurants' voluntary "claims" about their food from state and local efforts that regulate restaurants' mandatory disclosure of factual nutritional information. While the former type of regulation is preempted by the NLEA, the latter is not.[148] In other words, states and localities cannot regulate restaurants' voluntary statements, or "claims," about the foods that they serve. States and localities can, however, require restaurants to disclose factual nutritional information about their food. Therefore, regulations like New York City's revised Regulation 81.50, which contain no voluntary component and require *all* restaurants of a certain class to disclose factual nutritional information about their food, should not be preempted by the NLEA.

The second path concerns the NLEA's distinction between "claims" that describe or characterize food (e.g., low in fat), and nutritional facts (e.g., 80 mg sodium), which provide information about a food's nutritional content without making any descriptive claim about the food. The NLEA does not allow states and localities to regulate "claims" that restaurants make to describe or characterize their food. However, the NLEA allows states and localities to require restaurants to disclose nutritional information, or facts, about the content of their food.[149] The FDA's regulations concerning what constitutes a "claim" and what constitutes factual information are vague and, at times, confusing. The *NYSRA I* court acknowledged this, and explained that the FDA regulations suggest that, in some circumstances, statements like "contains 100 calories" could be interpreted as descriptive claims rather than factual information.[150]

Although neither the *NYSRA I* nor *NYSRA II* decision provides clear guidance about what constitutes a descriptive claim and what constitutes factual information, *NYSRA II* offers some assistance in interpreting this aspect of the NLEA. In *NYSRA II*, the NYSRA argued that the FDA's regulations are written in a way that makes it impossible to view the listing of calorie and additional nutritional information in restaurants as anything other than a "claim" under the NLEA. As part of its reasoning, the NYSRA argued that FDA regulations state that nutritional information that appears anywhere other than a label, as required by the NLEA and its regulations is, by default, a "claim."[151] This reading, however, does not account for the NLEA's deliberate failure to set nutritional labeling requirements for restaurants. Essentially, the NYSRA argued, *inter alia*, that because restaurants are not subject to nutritional labeling requirements under the NLEA, any nutritional information that they offer must therefore be a "claim." This type of circular reasoning is flawed because Congress, in the NLEA, chose to allow states and localities to implement laws that would require restaurants to provide nutritional information without the threat of federal preemption.[152] However, in *NYSRA II*, the NYSRA argued that state and local governments cannot regulate in this manner because any attempt to do so constitutes an attempt to regulate "claims" made by restaurants. As the *NYSRA II* decision suggests, this interpretation of the NLEA is illogical and inconsistent with the expressed purposes of the NLEA.

Interpreting the NLEA in a way that subjects all state and local menu labeling laws to federal preemption violates one of the key judicial canons of statutory interpretation. All U.S. courts adhere to the principle that "every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, *and give meaning to each*."[153] When interpreting a statute, a court cannot selectively determine that some parts of the statute will be enforced and other parts will have no effect under the law. Yet, with its interpretation of the NLEA, the NYSRA asked the *NYSRA II* court to do exactly this.

If, as the NYSRA urged in *NYSRA II*, state and local menu labeling laws are subject to federal preemption because they necessarily concern "claims" about nutritional content, then how does one account for the section of the NLEA that exempts state and local nutritional labeling laws for restaurants from federal preemption? If all state and local nutritional labeling laws involve "claims" and are subject to NLEA preemption, then there would be no purpose in Congress allowing states and localities to establish "requirement[s] for nutrition labeling of food . . . which is served in restaurants"[154] without the threat of federal preemption via the NLEA. As *NYSRA II* made clear, courts should not interpret the NLEA in a way that renders one of its provisions obsolete.[155] Consistent with separation of powers principles, courts must give meaning to this provision of the NLEA by recognizing that some state and local menu labeling laws, such as New York City's revised Regulation 81.50, involve nutritional labeling requirements for restaurants and do not regulate restaurants' descriptive claims. Therefore, state and local efforts like New York City's revised Regulation 81.50 are not subject to preemption by the NLEA.

Armed with a better understanding of the preemption issue, public health professionals and others can more effectively advocate for menu labeling laws, defend those laws against legal challenges, and ultimately provide consumers with information needed to make healthier nutritional choices.

D. Additional Issues for State and Local Advocates to Consider

While this article has focused on preemption, there are other issues that state and local policymakers and advocates should recognize when they consider action in the area of menu labeling. Although an in-depth discussion of these issues is beyond the scope of this article, states and localities should be aware of these other potential constitutional challenges when designing menu labeling interventions. First, restaurants may argue that menu labeling laws violate the First Amendment by compelling them to engage in a certain form of speech.[156] Restaurants may claim that menu labeling laws force them to use valuable restaurant space (i.e., menus and menu boards) to communicate nutritional information to customers in breach of the freedom of expression that underlies commercial speech protections. Moreover, restaurants might allege that the laws compel them to post certain nutritional information regardless of what proprietors believe is appropriate.

Restaurants might also challenge menu labeling laws under the Due Process or Equal Protection clauses of the 14th Amendment.[157] Restaurants might assert an equal protection challenge by claiming that menu labeling laws inappropriately single out a particular type of restaurant or business. In addition, restaurants could claim that menu labeling laws violate their due process rights by arguing, *inter alia*, that the laws are vague or unfairly applied. Finally, although it is unlikely to arise in a menu labeling context, those opposed to state or local menu labeling laws might argue that these laws unconstitutionally interfere with Congress's role in regulating interstate commerce. On balance, we believe these types of claims are unlikely to be successful.

VI. Conclusion

State and local menu labeling laws provide a potentially important legal tool to address the obesity epidemic in the United States. As with many other efforts to require an industry to alter its conduct in ways that might benefit the public's health, these laws have been subject to a number of legal challenges, including preemption. But if properly written and implemented, state and local menu labeling laws should not be preempted by the federal Nutrition Labeling and Education Act. In fact, Congress specifically intended that states and localities be allowed to establish "requirement[s] for nutrition labeling of food . . . which is served in restaurants."[158] The recent decision by the district court in *NYSRA II* bolsters this conclusion. The Second Circuit Court of Appeals recently declined to stay that decision pending an appeal. The ongoing experience in New York City now provides an exciting, large-scale laboratory for the design, implementation, and enforcement of menu labeling laws.

As more cities and states consider introducing menu labeling laws, those jurisdictions can benefit from the lessons learned by New York City and other places. Model legislation developed by public interest groups can also assist in the development of effective new laws.[159] Menu labeling advocates should continue to be wary of ongoing industry efforts to impose preemption of local laws in state legislatures. Armed with a better understanding of the preemption issue, public health professionals and others can more effectively advocate for menu labeling laws, defend those laws against legal challenges, and ultimately provide consumers with information needed to make healthier nutritional choices.

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61. L. O. Gostin, *Public Health Law: Power, Duty, Restraint* (Berkeley: University of California Press, 2000): at 48; U.S. Constitution, amend. X; e.g., *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).
62. *U.S. v. Lopez*, 514 U.S. 549 (1995).
63. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The U.S. Supreme Court, however, recently explained that a state law's public health purpose is not enough to save the law from being preempted by a federal law when Congress has the power to act and its intent to preempt is clear. *Rowe v. New Hampshire Motor Transp. Assn.*, 128 S.Ct. 989 (2008);

P. Yost, "Court Invalidates Maine Tobacco Law," Washington Post, Feb. 20, 2008.
64. 16 C.F.R. §§ 1203.1 to .17, .30 to .34, .40 to .41, .51 to .53 (2008).
65. J. T. O'Reilly, *Federal Preemption of State and Local Law* (Chicago: American Bar Association, 2006): at 23.
66. See G. B. Pursley, "Rationalizing Complete Preemption After *Beneficial National Bank v. Anderson*: A New Rule, A New Justification," *Drake Law Review* 54, no. 2 (2006): 371-472, at 385.
67. R. C. Ausness, "Preemption of State Tort Law by Federal Safety Statutes: Supreme Court Preemption Jurisprudence," *Kentucky Law Journal* 92, no. 4 (2003-2004): 913-977, at 969.
68. E. Chemerinsky, *Constitutional Law: Principles and Policies*, 2nd ed. (New York: Aspen Publishers, Inc., 2d ed. 2002): at 380.
69. See O'Reilly, *supra* note 65, at 52.
70. *Id.*
71. *Id.*, at 54.
72. M. J. Davis, "The Battle Over Implied Preemption: Products Liability and the FDA," *Boston College Law Review* 48, no. 5 (2007): 1089-1154, at 1092.
73. See O'Reilly, *supra* note 65, at 62-63.
74. See Chemerinsky, *supra* note 68, at 384-385.
75. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).
76. *Riegel v. Medtronic, Inc.*, 128 S.Ct. 999 (2008).
77. See Chemerinsky, *supra* note 68, at 390-91.
78. *Id.*, at 391.
79. See O'Reilly, *supra* note 65, at 72.
80. E.g., *Gade v. National Solid Waste Management Association*, 505 U.S. 88, 98 (1992).
81. See O'Reilly, *supra* note 65, at 75.
82. See Chemerinsky, *supra* note 68, at 398.
83. 529 U.S. 861 (2000).
84. See generally, P. Diller, "Intrastate Preemption," *Boston University Law Review* 87, no. 5 (2007): 1113-1176.
85. Dillon's rule is named for John Dillon, a 19th-century Iowa state court judge. Dillon published several treatises on local government law. His writings explain the theories behind what is now known as Dillon's rule. D. J. Barron, "Reclaiming Home Rule," *Harvard Law Review* 116, no. 8 (2003): 2255-2386, at 2285.
86. R. Briffault, "Our Localism: Part I — The Structure of Local Government Law," *Columbia Law Review* 90, no. 1 (1990): 1-115, at 8.
87. F. S. Bluestein, "Do North Carolina Local Governments Need Home Rule?" *North Carolina Law Review* 84, no. 6 (2006): 1983-2029, at 2011.
88. See Briffault, *supra* note 86, at 9.
89. D. J. Barron and G. E. Frug, "Defensive Localism: A View of the Field from the Field," *Journal of Law and Politics* 21, nos. 2-3 (2005): 261-291, at 263.
90. See Bluestein, *supra* note 87, at 1986.
91. *Id.*, at 1994.
92. Illinois Constitution, sec. 6.
93. Washington State Legislature, House Bill Report: ESHB 3160 (February 19, 2008), *available at* <http://apps.leg.wa.gov/documents/billdocs/2007-08/Pdf/Bill%20Reports/House/3160-S.HBR.pdf> (last visited October 7, 2008).
94. SB 6659; HB 3160 (Washington 2008).
95. The amended King County ordinance is discussed in Part II.B. When King County amended its ordinance, it changed the date of its effect from August 1, 2008 to December 1, 2008. The ordinance now applies to chain restaurants with 15 or more locations. It originally applied to restaurants with 10 or more locations. In addition, the amended ordinance only applies to items that remain on a chain restaurant's menu for more than 90 days. The original ordinance applied to items on a chain restaurant's menu for more than 60 days. The amended ordinance does not require restaurants to provide information about trans fats. See Public Health, Seattle & King County, *supra* note 48.
96. Ohio Restaurant Association, "Ohio Blocks Local Menu Labeling Authority," *ORA News*, January 4, 2008.
97. HB 217 (Ohio 2008).
98. HB 1303 (Georgia 2008).
99. A. Jones and E. Lee, "Bill Opposing Menu Labeling Goes to Governor," *Atlanta Journal-Constitution*, March 27, 2008.
100. Public Law No. 101-535, 104 Stat. 2353 (1990) (codified in part at 21 U.S.C. §§ 343(i), (q) and (r)).
101. HR Rep. No. 101-538 (1990); reprinted in 1990 U.S.C.C.A.N. 3337.
102. Although designed to benefit consumers, the Act provides no mechanism for a private cause of action against entities that sell mislabeled foods. *Cohen v. McDonald's Corp.*, 808 N.E.2d 1, 8 (Ill.App. 2004); see generally E. T. Guarino, "Nutrient Descriptor and Disease Claims for Foods Under the New FDA and USDA Rules," *Food & Drug Law Journal* 48, no. 4 (1993): 665-674.
103. 21 U.S.C. § 343(q) (2008); 21 C.F.R. §§ 101.1-101.9 (2008).
104. 21 U.S.C. § 343(q)(1).
105. 21 U.S.C. § 343(q)(5).
106. 21 U.S.C. § 343-1(a)(4).
107. 21 U.S.C. § 343(r)(5).
108. 21 U.S.C. § 343(r)(1).
109. 21 C.F.R. § 101.13(b).
110. 21 C.F.R. §§ 101.10, 101.13, 101.54-101.65.
111. *Public Citizen, Inc. v. Shalala*, 932 F.Supp. 13, 18 (D.D.C. 1996).
112. *Reyes v. McDonald's Corp.*, 2006 WL 3253579, *4-*7 (N.D.Ill. 2006).
113. 21 C.F.R. § 101.10.
114. 21 U.S.C. § 343-1, note on Construction.
115. 21 U.S.C. § 343-1(a)(4).
116. *Id.*
117. 136 Cong. Rec. S16607, S16608 (Oct. 24, 1990).
118. 21 U.S.C. § 343-1(a)(5).
119. See Institute of Medicine, *Food Labeling: Toward National Uniformity* (Washington, D.C.: National Academy Press, 1992): at 142-143; C. Jordan, "Preemption and Uniform Enforcement of Food Marketing Regulations," *Food & Drug Law Journal* 49, no. 2 (1994): 401-407, at 404.
120. 21 U.S.C. § 343(r)(2)(B).
121. 21 U.S.C. § 343-1(b).
122. *Id.*
123. 21 C.F.R. §§ 101.69, 101.70 (2008).
124. See generally K. M. Sullivan and G. Gunther, *Constitutional Law*, 14th ed. (New York: Foundation Press, 2001): at 119-171, 234-305.
125. See notes 114-120 and accompanying text.
126. See U.S. Food and Drug Administration, *supra* note 11; Koplan, Liverman, and Kraak, *supra* note 2.
127. 509 F.Supp.2d 351 (S.D.N.Y. 2007). For this case, three groups filed briefs as amici, or friends of the court, in support of the New York City Board of Health. These briefs were filed by the following: (1) U.S. Representative Henry Waxman, Public Citizen, Center for Science in the Public Interest et al.; (2) the Rudd Center for Food Policy and Obesity at Yale University; and (3) a consortium of state and local governments.
128. 509 F.Supp.2d 351, 352-53 (S.D.N.Y. 2007).
129. *New York State Restaurant Association v. New York City Board of Health*, 2008 WL 1752455 (S.D.N.Y. 2008). For this case, two groups filed briefs as amici, or friends of the court, in support of the New York City Board of Health. These briefs were filed by (1) U.S. Representative Henry Waxman, Public Citizen, Center for Science in the Public Interest et al.; and (2) the Rudd Center for Food Policy and Obesity at Yale University.
130. 509 F.Supp.2d 351, 353 (S.D.N.Y. 2007).
131. *Id.*
132. *Id.*, at 359.
133. *Id.*, at 360.

134. *Id*., at 361, n.14 (emphasis added).
135. *Id*., at 362.
136. *Id*., at 363.
137. *Id.*
138. New York City Department of Health and Mental Hygiene, *Board of Health Votes to Require Chain Restaurants to Display Calorie Information in New York City*, Press Release, January 22, 2008, *available at* <http://www.nyc.gov/html/doh/html/pr2008/pr008-08.shtml> (last visited October 7, 2008).
139. *New York State Restaurant Association v. New York City Board of Health*, 2008 WL 1752455 (S.D.N.Y. 2008).
140. Brief for Plaintiff at 17, *New York State Restaurant Association v. New York City Board of Health* (S.D.N.Y. January 31, 2008).
141. *Id*., at 20.
142. *New York State Restaurant Association v. New York City Board of Health*, 2008 WL 1752455, at *4.
143. *Id*., at *4.
144. *Id*., at *5.
145. *Id.*
146. 21 U.S.C. § 343-1(a)(5) (2008).
147. 21 U.S.C. § 343-1(a)(4). In April 2008, the FDA provided updated guidance that reinforces this interpretation of the NLEA. Office of Nutrition, Labeling, and Dietary Supplements, U.S. Food and Drug Administration, "A Labeling Guide for Restaurants and Other Retail Establishments Selling Away-from-Home Foods," April 2008, *available at* <http://www.cfsan.fda.gov/~dms/labrguid.html> (last visited October 7, 2008).
148. *New York State Restaurant Association v. New York City Board of Health*, 2008 WL 1752455 (S.D.N.Y. 2008); *New York State Restaurant Association v. New York City Board of Health*, 509 F.Supp.2d 351 (S.D.N.Y. 2007).
149. See notes 114-120 and accompanying text.
150. *New York State Restaurant Association v. New York City Board of Health*, 509 F.Supp.2d 351, 360-61 (S.D.N.Y. 2007).
151. Brief for Plaintiff at 18, *New York State Restaurant Association v. New York City Board of Health* (S.D.N.Y. January 31, 2008); 21 C.F.R. § 101.13(c) (2008).
152. 21 U.S.C. § 343-1(a)(4).
153. *Washington Market Co. v. Hoffman*, 101 U.S. 112, 116 (1879) (emphasis added).
154. 21 U.S.C. § 343-1(a)(4).
155. *New York State Restaurant Association v. New York City Board of Health*, 2008 WL 1752455, *4-*5 (S.D.N.Y. 2008); see *Mastro Plastics Corp. v. National Labor Relations Bd.*, 350 U.S. 270, 298 (1956).
156. Brief for Plaintiff at 28-38, *New York State Restaurant Association v. New York City Board of Health* (S.D.N.Y. Jan. 31, 2008).
157. U.S. Constitution, amend. XIV.
158. 21 U.S.C. § 343-1(a)(4).
159. E.g., see Public Health Law & Policy, *supra* note 44.